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IN THE

Supreme Court of the United States

October Term, 1963
No. 5, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA,

Defendant.

Memorandum for the State of California in Opposition to "Motion for Leave to File Petition in Intervention or File Amicus Curiae Brief" Filed by Carl Whitson

A "Motion for Leave to File Petition in Intervention or File Amicus Curiae Brief" was received by the Attorney General of California on March 13, 1964. This motion was filed by "Carl Whitson, *Pro se*" as a municipal taxpayer of the City of Long Beach, California. Specifically, petitioner alleged: "That Carl Whitson, is a taxpayer, citizen, and property owner of said city, and institutes this action on behalf of all other taxpayers of like circumstances." (Motion, pp. 1-2.) Other than the aforementioned status and interest, Mr. Whitson has alleged no definite and immediate interest in the subject matter of this litigation.

The State of California opposes Mr. Whitson's motion for permission to intervene or to file an Amicus Curiae Brief herein, on the following grounds:

I

The State of California Has the Exclusive Right to Represent All of Its Citizens as Parens Patriae

The only interest in this suit alleged by petitioner is that he "is a taxpayer, citizen, and property owner of said city [Long Beach, California] and institutes this action on behalf of all other taxpayers of like circumstances." (Motion, pp. 1-2.) While petitioner does not in so many words state that he is a citizen of California, this conclusion necessarily follows from his allegation that he is a citizen of the City of Long Beach in the State of California.

A state, when a party to a suit involving a matter of sovereign interest, must be deemed to represent all of its citizens.

> *State of New Jersey v. State of New York,* 345 U.S. 369, 372-373 (1953);
>
> *Commonwealth of Kentucky v. State of Indiana,* 281 U.S. 163, 173-174 (1930).

As stated by this Court in *State of New Jersey v. State of New York, supra,* 345 U.S. at page 373:

> "Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions. An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state."

Petitioner herein has not met this burden.

II

If Granted, the Requested Intervention, in Effect, Would Permit a Suit Against California by One of Its Citizens

Petitioner does not specifically ask to be made a party plaintiff or a party defendant. However, the entire tenor of his motion is adverse to the State of California. Moreover, as heretofore stated, while petitioner does not expressly allege that he is a citizen of California, he does allege that he is a citizen of the City of Long Beach, California (Motion, pp. 1-2). It thus appears that petitioner seeks to be made an adverse party to the State in an original proceeding in which California is also a party.

Under Rule 24 of the Federal Rules of Civil Procedure, an intervenor in an action or proceeding is, for all intents and purposes, an original party. *In re Raabe, Glissman & Co., Inc.*, 71 F.Supp. 678, 680 (S.D. N.Y. 1947.) If petitioner is allowed to intervene this, in effect, would permit him to maintain an original suit against the State of California. However, it is well settled that if petitioner is a citizen of the State of California, this Court would have no original jurisdiction over a suit in which the State and one of its citizens were adverse parties. *Pennsylvania v. Quicksilver Company*, 77 U.S. (10 Wall.) 553, 556 (1870); *California v. Southern Pacific Company*, 157 U.S. 229, 261-262 (1895); *Duhne v. State of New Jersey*, 251 U.S. 311, 313-314 (1920). Of course, an original proceeding against California by a citizen of another State is barred by the Eleventh Amendment to the United States Constitution. *Ex Parte State of New York, No. 1*, 256 U.S. 490, 497 (1921); *Monaco* v.

Mississippi, 292 U.S. 313, 329 (1934). Whether this Court has power to grant an application for leave to intervene in an original proceeding, when that right is sought by one who could not have been made a party at the outset, presents a question upon which there exists considerable doubt. *Cf State of Florida v. State of Georgia*, 58 U.S. (17 How.) 478 (1854).

III

Petitioner Improperly Seeks to Broaden the Scope of the Litigation

At its inception, the instant suit was an original proceeding in this Court, brought by the United States in 1945 against the State of California, to obtain an adjudication of the respective rights of the sovereign parties in and to the three mile belt of the Pacific Ocean adjacent to the Coast of California.

In its present posture, the case presents a controversy between the United States and the State as to the precise location of the seaward boundaries of California under the Submerged Lands Act. (67 Stat. 29, 43 U.S.C. §§ 1301-1315 (1953).)

Petitioner seeks to inject into this suit a completely new issue relating to an alleged title controversy between the City of Long Beach and the State of California over submerged lands restored to California by the Submerged Lands Act. Moreover, petitioner asks this Court to consider and rule upon the propriety of the use of tidelands trust income by the City of Long Beach under California law. In this connection, petitioner urges:

> "2. The title to said lands is such that the income therefrom can be used by the City of Long

Beach for any municipal purpose without trusts or restrictions by the State of California." (Motion, p. 3.)

"4. It will be urged that the State of California is wrong in contending that the state has legal power to establish trusts on the income by the city or has legal power to take from Long Beach all income from such submerged lands." (Motion, p. 3.)

However, it is clear that petitioner cannot, by the device of intervention, enlarge the scope of the litigation framed by the original parties. *Chandler Co. v. Brandtjen, Inc.*, 296 U.S. 53, 58 (1935); *Thompson v. Deal*, 49 F.Supp. 366, 369 (D.D.C. 1943); *Slusarski v. United States Lines Co.*, 28 F.R.D. 388, 390 (E.D. Pa. 1961).

IV

Petitioner Failed to Meet the Procedural Requirements for Intervention

Rule 9(2) of the Supreme Court Rules, applicable to actions within the original jurisdiction of the Court, reads in part as follows:

"The forms of . . . motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, 28 U.S.C.A., . . ."

Petitioner has failed to comply with Rule 24(c) of the Rules of Federal Procedure which provides in part:

". . . The motion [to intervene] . . . shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought."

Petitioner has not filed such accompanying pleading.

Furthermore, petitioner has not complied with either Rule 24(a) of the Federal Rules of Civil Procedure,

which deals with intervention as a matter of right, or Rule 24(b), which relates to permissive intervention. Clearly, no statute of the United States confers on petitioner an unconditional right to intervene. Moreover, as a prerequisite to intervention under both Rule 24(a) and Rule 24(b), an application must be "timely".

California contends that Mr. Whitson's application is not timely. This suit was commenced in October of 1945, a decision was rendered on June 23, 1947, followed by a decree entered October 27, 1947. 332 U.S. 804. Thereafter, this Court appointed a Special Master and by a series of references directed him to make recommendations relating to a line of demarcation between lands owned by the State and those in which the United States had been held to have paramount rights. The third and final Report of the Special Master was filed in November 1952, and although exceptions thereto were filed by both parties, no action was taken thereon. This case was reactivated in March 1963 when the United States filed a Motion for Leave to File a Supplemental Complaint herein. Subsequently, the United States was allowed to file its Supplemental Complaint to which California has filed its Answer. Thus, after this case has been pending for approximately 19 years, petitioner seeks to inject into the proceedings extraneous issues unrelated to the basic controversy between the Nation and the State, which is to fix the seaward boundaries of California. It is respectfully submitted that the injection into this suit of an alleged collateral controversy between the State of California and the City of Long Beach would undoubtedly delay and prejudice the adjudication of the rights of the original parties yet to be determined herein.

V

Permission to Appear as Amicus Curiae Should Be Denied

As stated in *Garland Co. v. Filmer,* 1 F.Supp. 8, 13 (N.D. Cal. 1932), amici curiae appear by permission of the court to enlighten it by their assistance.

Leave to appear amicus curiae will be denied where it does not appear that the applicant is interested in any other case which will be affected by the decision and the parties are represented by competent counsel. Under such circumstances, the need of assistance will not be assumed.

Northern Securities Company v. United States, 191 U.S. 555, 556 (1903).

Moreover, it has been held that the alternative of permitting a proposed intervenor to be heard as amicus curiae should be denied where he has made it plain that he seeks nothing short of the opportunity to conduct "a vigorous adversary proceeding" under circumstances which would displace the Attorney General as vindicator of the public interest. *United States v. Loew's Incorporated,* 20 F.R.D. 423, 425 (S.D.N.Y. 1957).

California urges that permission for Mr. Whitson to file an amicus curiae brief should be denied, where it is clear that he intends to use such a brief as a vehicle for injecting extraneous issues into this litigation, and where the interests of California are represented by its Attorney General.

Conclusion

California requests that the Motion for Leave to File Petition in Intervention or to File Amicus Curiae Brief be denied.

Respectfully submitted,

STANLEY MOSK,
Attorney General,

HOWARD S. GOLDIN,
Assistant Attorney General,

Attorneys for State of California.

Dated: March 30, 1964.

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